No. 77-1001

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALEX MARKLEY AND ANTONIO SUARES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet, App. A) is reported at 567 F. 2d 523.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1977. The petition for a writ of certiorari was filed on January 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the definition in the National Firearms Act, 26 U.S.C. 5845(f), of a "destructive" device includes a homemade bomb or similar devices.

2. Whether the court of appeals properly considered evidence of certain tests in evaluating whether petitioners' homemade devices were "destructive device[s]."

3. Whether 26 U.S.C. 5845(f), as applied to homemade devices containing black powder and having explosive potential, is unconstitutionally vague.

STATUTES INVOLVED

26 U.S.C. 5845(f) provides in pertinent part:

> (f) *Destructive device.* The term 'destructive device' means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; * * * (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined [above] and from which a destructive device may be readily assembled. The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon * * *.

26 U.S.C. 5861 provides in pertinent part:

> It shall be unlawful for any person—
>
> * * * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration, and Transfer Record; or
>
> (e) to transfer a firearm in violation of the provisions of this chapter; * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner Markley was convicted of one count of possessing and four counts of transferring an unregistered destructive device, and petitioner Suares was convicted of three counts of possessing and three counts of transferring an unregistered destructive device, in violation of 26 U.S.C. 5812 and 5861(d) and (e). Petitioner Markley was sentenced to 18 months' imprisonment, and petitioner Suares was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

1. The facts are set out in the opinion of the court of appeals (Pet. App. 2-5). In November 1975, petitioner Markley, a union organizer, asked undercover Agent O'Reilly to blow up two trucks belonging to Martin Brothers Trucking Company. Petitioner Markley gave Agent O'Reilly a bomb but, after testing it, O'Reilly told Markley that the device was inadequate (Pet. App. 4; R. 100). Later in the month O'Reilly met with both petitioners, and Markley told O'Reilly that he still wanted to blow up the Martin Brothers' trucks (R. 120). On December 5, 1975, O'Reilly telephoned petitioner Markley and requested three devices similar to the one Markley had furnished earlier, but this time the devices were to be taped with electrician's tape and were to have different lengths of fuse attached (Pet. App. 5; R. 125-126). Three days later petitioner Suares delivered the three assembled devices to O'Reilly for $75 (Pet. App. 5).

2. At trial petitioners stipulated that they had possessed and transferred the devices (Pet. App. 2; R. 620) and defended only on the ground that the devices were not "destructive devices" within the meaning of 26 U.S.C.

5845(f).[1] The devices consisted of paper tubes approximately 4 1/2 inches in length and 1 1/2 inches in diameter; they contained between 3 1/2 and 4 1/2 ounces of commercially manufactured black powder with a small amount of toilet tissue as a filler. The ends were sealed with paraffin wax over cardboard discs, and one end contained a fuse (Pet. App. 2-3). The government's expert witness, Ralph Cooper, Explosive Enforcement Officer of the Bureau of Alcohol, Tobacco, and Firearms, conducted tests on replicas, or exemplars, of the devices in November 1976 (Pet. App. 3); petitioners' expert did the same (Pet. App. 3).

The results of all tests were similar. One exemplar, set out in the open, produced an eleven cubic-foot fireball when detonated (Pet. App. 3), and a second, detonated in a trash can, sent the lid 25 to 30 feet in the air (R. 352). An exemplar ignited in a closed cab of a pickup truck blew the windshield out of the vehicle and threw it 6 to 8 feet (Pet. App. 3-4; R. 453). An exemplar in a filler pipe attached to an empty gas tank produced an explosion that burst the filler pipe and caused the gas tank to bulge (Pet. App. 4; R. 455-456). Cooper concluded that the devices were explosive bombs that had no use except to destroy property or injure persons (Pet. App. 4; R. 465, 516).

ARGUMENT

1. Petitioners contend that the definition of "destructive device" in the National Firearms Act, 82 Stat. 1231, 26 U.S.C. 5845(f), includes only military ordnance, gangster-type weapons, or similar "highly" destructive

[1]A count charging conspiracy to attempt maliciously to damage or destroy vehicles used in interstate commerce by means of an explosive was dismissed by the trial court at the close of the government's case.

devices (Pet. 10-15). But petitioners' argument ignores the plain meaning of the statutory definition, which speaks of any explosive "bomb[s]" or similar device[s]." There was evidence that the devices here were bombs (R. 465, 516); in any event, the statute's proscription of "similar device[s]" necessarily goes beyond military ordnance. See *United States* v. *Peterson*, 475 F. 2d 806, 811 (C.A. 9), certiorari denied, 414 U.S. 846; *United States* v. *Oba*, 448 F. 2d 892 (C.A. 9), certiorari denied, 405 U.S. 935; cf. *United States* v. *Powell*, 423 U.S. 87, 91.

a. In support of their argument, petitioners rely primarily upon the decision of the Second Circuit in *United States* v. *Posnjak*, 457 F. 2d 1110, which they claim restricts the Act's reach to military or gangster-type weapons and thus conflicts with the decision below. *Posnjak* held only that ordinary commercial blasting dynamite does not come within 26 U.S.C. 5845(f)(1), since it is not an explosive of the kinds specifically enumerated, nor is it a "similar device" merely because it is a product (like "innumerable other articles") having "some explosive power" (457 F. 2d at 1116).[2] Similarly, because commercial dynamite did not come within subparagraph (1), it could not be brought within subparagraph (3) ("any combination of parts either designed or intended for use in converting any device into a destructive device as defined" in subparagraph (1)) merely because the defendants intended to use the dynamite unlawfully.

This case is plainly distinguishable from *Posnjak*, for petitioners' devices were not ordinary commercial explosives. They were designed for use as weapons, and they were homemade, containing black powder inside

[2]Furthermore, as *Posnjak* noted, 26 U.S.C. 5845(f) specifically excludes any device which is not designed for "use as a weapon."

paper tubes, with fuses attached (Pet. App. 2-3). The devices produced fireballs in the open and caused damage when exploded within a confined space (Pet. App. 3-4). As such, they clearly come within subparagraphs (1) and (3) of Section 5845(f), since they are bombs or at least devices "similar" to bombs and "designed" as such.

Furthermore, later cases in the Second Circuit demonstrate that petitioners' reliance upon *Posnjak* is misplaced. In *United States* v. *Cruz,* 492 F. 2d 217, 219, certiorari denied, 417 U.S. 935, the court of appeals stated:

> We recognized in *United States* v. *Posnjak, supra*, that the legislative history of the Firearms Act indicates that it requires registration of objectively destructive devices, devices inherently prone to abuse and for which there are no legitimate industrial uses.

The court of appeals there found that a Molotov cocktail was within the statutory definition, for it has "no use besides destruction" (492 F. 2d at 219). See also *United States* v. *Bubar*, 567 F. 2d 192, certiorari denied, October 3, 1977 (No. 77-5304) (homemade device consisting of dynamite, blasting caps, fuses, and timers was within statutory definition for it had no lawful industrial use). Clearly then, the instant devices are within Section 5845(f), for they lack any legitimate industrial use and were plainly designed for use as weapons. There is no basis for supposing that the Second Circuit would hold otherwise.

b. Petitioners also contend that portions of the legislative history of Section 5845(f) refer to application of the statute to "highly" destructive devices, and they argue that the devices here are "relatively harmless" and

therefore not within the intended reach of the statute (Pet. 9, 12-15). But the legislative history cited by petitioners casts no doubt on their conviction. While it is true that the legislative materials contain the phrase "highly destructive device," there is no reason to suppose that the potentially destructive bombs involved in this case were not within the expected ambit of the statutory prohibition. Indeed, the statute, as well as the Senate Report upon which petitioners rely (Pet. App. 18-24), defines "destructive device" to exclude rockets having a propellent charge of four ounces or less and missiles having a charge of one-quarter ounce or less. *Id.* at 19, 20. But there is no corresponding minimum for charges in bombs, grenades or "similar devices," and the Senate must therefore be presumed to have intended none. Furthermore, the Report shows (*id.* at 21) that the Senate Committee used "highly destructive devices" generically to refer to "explosive or incendiary bombs, grenades, mines, etc." and did not distinguish between bombs of greater or lesser destructiveness. The lack of distinction is reflected in the statute, which contains no requirement that the devices be "highly" destructive. Whether petitioners' devices were "highly" destructive or only moderately or slightly so, they were within the reach of the statute. See, *e.g., United States* v. *Wilson*, 546 F. 2d 1175 (C.A. 5), certiorari dismissed, 431 U.S. 901 (homemade dynamite bomb); *United States* v. *Evans,* 526 F. 2d 701 (C.A. 5) (homemade dynamite bomb that failed to function, even when tested by the government); *United States* v. *Curtis,* 520 F. 2d 1300 (C.A. 1) (homemade dynamite bomb); *United States* v. *Cruz, supra* (Molotov cocktail); *United States* v. *Tankersley,* 492 F. 2d 962 (C.A. 7) (firecracker, fuse, paint remover in bottle).

2. Petitioners argue (Pet. 15-17) that the court of appeals, in finding the devices to be within Section 5845(f), improperly considered evidence of petitioners' "intended use" of the devices although the trial court instructed the jury that intent was not to be considered. The crux of petitioners' argument seems to be that the court of appeals, in concluding that the devices here were "destructive," improperly relied in part on tests showing what happened when the devices were detonated in a truck cab, rather than relying solely on tests conducted in the open (Pet. 16-17). The closed-area tests, according to petitioners, were of "intended use," and thus they assert that the court of appeals could not properly consider them. But the court of appeals did no more than refer to evidence of tests properly before the jury. Petitioners do not claim that the admission of the government's tests was erroneous, nor did they dispute the facts of such tests at trial (Pet. App. 4). There is no reason that the court of appeals, in considering evidence of destructiveness, was obliged to confine itself to tests conducted in the open air and to ignore evidence—properly admitted—of tests conducted in closed spaces. Even if evidence of "intended use" were improper, see *Posnjak, supra,* this evidence did not fall into that category. Plainly, in any event, this is not an issue meriting consideration by this Court.

3. Petitioners also contend that the statute as applied is void for vagueness (Pet. 18-20). But the court of appeals properly concluded that petitioners' vagueness argument is answered by *United States* v. *Morningstar,* 456 F. 2d 278, 281 (C.A. 4), certiorari denied, 409 U.S. 896:

> Nor do we find merit in Morningstar's plea that the Gun Control Act of 1968 is too vague to satisfy the requirements of due process. Questions about the Act's definitions arise only when resort is made to

> legislative history for the purpose of limiting the accepted meaning of simple and well known words. On its face, the definition of a destructive device gives fair notice to a person of ordinary intelligence that it includes any combination of parts intended to be used as a bomb or weapon and from which a bomb or weapon can be readily assembled. See *United States* v. *Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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